IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI

BEFORE SHRI MAHAVIR SINGH (VICE PRESIDENT) AND SHRI S. RIFAUR RAHMAN (ACCOUNTANT MEMBER)

ITA No. 6611/MUM/2019
Assessment Year: 2013-14

Pearl Coschem Private Limited, 83, 8th floor, Jolly Maker Chambers II, Nariman Point, Mumbai-400021. **PAN No. AAACP 3117 G** **Appellant**	**Vs.**	Deputy Commissioner of Income Tax 3(2)(2), Room No. 608, 6th floor, Aayakar Bhavan, Maharshi Karve Marg, Mumbai-400020. **Respondent**

Assessee by	:	Mr. Vijay Mehta, AR
Revenue by	:	Ms. Shreekala Pardeshi, DR
Date of Hearing	:	25/03/2021
Date of pronouncement	:	02/06/2021

ORDER

PER S. RIFAUR RAHMAN, A.M.

This is an appeal filed by the assessee. The relevant assessment year is 2013-14. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-9, Mumbai [in short 'CIT(A)'] and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The brief facts of the case are, assessee filed its return of income for assessment year 2013-14 on 30.09.2013 declaring total income at Rs.88,44,342/– the case was selected for scrutiny and statutory notices under section 143 (2) and 142 (1) of the Income Tax Act, 1961 (in short Act). In

response, A.R. of the assessee attended and filed a relevant information as called for.

3. The AO observed that assessee had entered into a MOU with M/s Sambhav Infrastructure Private Limited (SIPL) in order to invest in the ongoing projects under taken by SIPL. The assessee invested an amount of Rs.31,046,400/– during this assessment year. As per the MOU, AO observed that the assessee was promised to receive 18 instalment of Rs.20,79,000/– as per below schedule from SIPL:

Date of installment	**Amount of installment (Rs.)**
21st November, 2012	20,79,000/-
21st December, 2012	20,79,000/-
21st January, 2013	20,79,000/-
21st February, 2013	20,79,000/-
21st March, 2013	20,79,000/-
21st April, 2013	20,79,000/-
21st May, 2013	20,79,000/-
21st June, 2013	20,79,000/-
21st July, 2013	20,79,000/-
21st August, 2013	20,79,000/-
21st September, 2013	20,79,000/-
21st October, 2013	20,79,000/-
21st November, 2013	20,79,000/-
21st December, 2013	20,79,000/-
21st January, 2014	20,79,000/-
21st February, 2014	20,79,000/-

21st March, 2014	20,79,000/-
21st April, 2014	20,79,000/-

Further, AO observed from the MOU that SIPL shall give 18 PDCs and the said PDCs shall be deposited on the due dates without reference to SIPL. Based on the above observations, the assessee was asked to show cause as to why the profit element in the above said project should not be taxed, in response assessee filed a letter dated 11.2.2016, for the sake of brevity it is reproduced below:

> "Please note that our client made investments by acquiring 74 residential flats and has made the payment of Rs.3,10,46,400/- to the developer. It was the obligation of the developer to help and assist our client and also sell the residential flats in which investments were made. The total sate consideration which would have been received on transfer of the 74 resident/at flats will be the sale consideration and after reducing the cost of acquisition the resultant gain would be chargeable to tax to capital gains. As explained and as proved before you, not a single residential flat is sold in AY 2013-14 and no income has accrued to our client. You will appreciate that Section 45 of Income Tax Act, 1961 will only apply when there is transfer of capital asset during the financial year. In the absence of any transfer no capital gain can be computed in the hands of the assesses. Our objection to your proposed addition is that no income has accrued or received by our client during the A.Y 2013-14 and hence no income can be brought to tax.
>
> As regards the proposition that no income has accrued to our client, we state that section 5 of income Tax Act, 1961 is the charging section. As per Section 5, the total income of any previous year of a person, who is resident, includes ail income from whichever source, which accrues or arises or is deemed to accrue or arise in India during such year. The income will accrue to the company only when the company has acquired right to receive such income. The Hon'ble Supreme Court in the case of E.D.

Sasoon & Co. Ltd. vs CIT reported in 261 ITR pg. 27, has held that a debt must have come into existence when the assessee has acquired a right to receive the payment. Unless there is an existence of a debt or right to receive the payment, the income cannot be deemed to have accrued. The similar view also has been expressed by Hon'ble Supreme Court in the case of Asholbhai Chimanbhai reported in 56 ITR pg. 42. The basic tenets of the income as defined u/s 2(24) of Income Tax Act, 1961 r.w.s. 5, must exist in order to treat a particulars amount as income and more so income chargeable to tax. All these important and basic features of determining the income in the present transaction."

AO rejected the submissions of the assessee merely relying on the cheque collection clause of the MOU that the PDCs shall be deposited on due dates without reference to SIPL. Accordingly, the AO made the addition the difference between total realization of all the post dated cheques to the extent of Rs.3,74,22,000/- minus investment of Rs.31,046,400/- as income from investment made.

4. Aggrieved with the above order, assessee preferred an appeal before Commissioner of Income Tax (appeals) – 9, Mumbai and made a detailed submission. After considering the submissions of the assessee, Ld. CIT(A) dismissed the appeal of the assessee with the following observation:

"4.2.5 From the examination of the MOU, following crucial facts regarding the transactions under consideration emerge:

i. The sell proceeds from 14 flats were quantified by both the parties by mutually agreeing to the terms of MOU. The total amount of sale proceeds to be paid by M/s Sambhav Infrastructure Pvt. Ltd. to the appellant in 18 instalments was Rs.3,74,22,000/-.

ii. M/s Sambhav Infrastructure Pvt. Ltd. gave a commitment of selling all the flats which were allotted to the appellant vide various allotment letters dated 11-09-2012 within 2 months from 10-09-2012 onwards.

iii. M/s. Sambhav Infrastructure Pvt. Ltd. gave a commitment to the appellant to return sale proceeds totalling to Rs.3,74,22,000/- within a period of 18 months starting from 21-11-2012 to 21-04-2014.

iv. M/s, Sambhav Infrastructure Pvt. Ltd. was required to give 18 postdated cheques equivalent to the instalment amounts to the appellant.

v. The appellant was free to deposit the 18 post dated cheques on due dates without reference to M/s. Sambhav Infrastructure Pvt. Ltd.

4.2.6 From the above crucial facts, it is evident that the MOU created a right in favour of the appellant to receive Rs.3,74,22,000/- from M/s. Sambhav Infrastructure Pvt Ltd. within a specific period of time. The right to receive sale proceeds amounting to Rs.3,74,22,000/- was also reinforced by issue of 18 post dated cheques of equal amounts.

4.2.7 As rightly stated by the appellant the proposition regarding the accrual or arising of income is provided in Section 5 of the Act which is the charging section. In order that income, profits or gains may accrue to a person, it is necessary that he must have acquired a right to receive sale or right to the income, profits or gains has become vested in him as decided by the Supreme Court in the decision of CIT Vs. Shri Govardhan Ltd. 69 ITR 675. The Hon'ble Supreme Court in the case of Morvi Industries Ltd. vs. CIT 82 ITR 835 decided that the postponement of payment does not affect the accrual of the income. The fact that the amount of the income is not subsequently received by the assessee would not also detract from or efface the accrual of the income, although non receipt may in appropriate cases be a ground for playing deduction.

4.2.8 The appellant follows mercantile method of accounting as evident from the record. The right to receive Rs.3,74,22,000/- had clearly arose from the MOU and on account of fulfilment of all the responsibility by the appellant as mentioned in the MOU. The appellant has also not submitted any arguments or evidence to prove that MOU was legally not enforceable. In such situation, the appellant should have shown the receipt of sale proceeds of Rs.3,74,22,000/- arising from investment in the project Stavan Parishray on accrual basis. However, the appellant preferred to represent the transaction in conveniently different manner, which was not in consonance with the principles of accounting and also the provisions of the Act. Though the appellant misrepresented the transactions while accounting, that would not change the nature of the transaction and also the fact of accrual of the income to the appellant from such transaction.

4.2.9 The appellant has argued that the flats were not sold within two months as per the plan and even after that due to adverse market condition. The appellant has also argued that the income will accrue only after the flats are sold by the project developer. The arguments made by the appellant are not tenable because, as per the MOU, the developer, M/s. Sambhav Infrastructure Pvt. Ltd. was committed to return the sale proceedings amounting to Rs.3,74,22,000/- without any condition. The payment of amount of Rs.3,74,22,000/- by M/s. Sambhav Infrastructure Pvt. Ltd was not contingent on the event of sale of flats. The appellant was free to deposit the post dated cheques as it's will without any reference to M/s. Sambhav Pvt Ltd.

4.2.10 Had the right to receive the amount of Rs.3,74,22,000/-arose by virtue of the MOU, handing over of the post dated cheques and the fulfilment of all the conditions mentioned in the MOU by the appellant? Answer to this question is key to decide the issue under consideration. The fact that M/s. Sambhav Infrastructure Pvt. Ltd. handed over 18 post dated cheques totalling to Rs.3,74,22,000/- to the appellant is crucial to determine the answer. It is also pertinent to note that the appellant was having unconditional powers to deposit these cheques. This means that the appellant was free to deposit these cheques and realize the amount of Rs.3,74,22,000/- even in a situation in which M/s. Sambhav Infrastructure Pvt. Ltd. was not able to sale the flats. The MOU is silent about the situation in which M/s. Sambhav Infrastructure Pvt. Ltd.

is not able to sale the flats. It speaks about the commitment given by M/s. Sambhav Infrastructure Pvt. Ltd. to handover the sale proceeds. However, what is material here is the handing over of post dated cheques with freedom for the appellant to deposit the same without any conditions as such. Thus, the fact that M/s. Sambhav Infrastructure Pvt. Ltd. handed over post dated cheques totalling to Rs.3,74,22,000/- along with the fact that the MOU gave unequivocal and unconditional power to the appellant to deposit the cheques which were in the form of return for the investment made by the appellant, establish that the right to receive amount of Rs.3,74,22,000/- was created in favour of the appellant on 11.09.2012

4.2.11 Therefore, in view of the overall reading of the MOU between the appellant and M/s Sambhav Infrastructure Pvt. Ltd. and the facts arid circumstances, it is very clear that the income of Rs.63,75,600/- had accrued and arose to the appellant by virtue of the clauses mentioned in the legally binding MOU and the feet that the post dated cheques were given with a freedom to deposit without any reference. Therefore, the addition of Rs.63,75,600/- made by the AO in this regard is confirmed. These grounds of appeal are dismissed."

5. Aggrieved with the above order assessee in appeal before us raising following grounds of appeal:

1. On the facts and circumstances or the case the Learned Commissioner of Income Tax (Appeals)-58 ("CIT-A") erred in confirming the addition made by Learned Assessing Officer ("AQ") of INR. 63,75,600/- and treating the same as business income. The addition made by the Learned Assessing Officer and confirmed by Learned CIT-A is erroneous and contrary to the facts of the case.
2. On the facts and circumstances of the case the Learned CIT-A has erred in ignoring the fact that, no income has accrued or received to the appellant during the assessment year under consideration to the extent of INR. 63,75,600/- as computed by the Learned A.O. and confirmed by the Learned CIT-A. On the facts and circumstance of the case the Learned CIT-A has erred rejecting the claim of

the appellant. The appellant prays that no income has accrued or is received by the appellant to the extent of INR. 63,75,600/-.

3. On the facts & circumstances of the case the Learned CIT-A has erred in concluding that sum of INR. 63,75,600/- is chargeable to tax. The conclusion reached by Learned CIT-A is erroneous and contrary to the provisions of the law.
4. On the facts & circumstances of the case the Learned CIT-A has erred in concluding that Income has accrued to the appellant amounting to INR. 63,75,600/-. The conclusion reached by Learned CIT-A is erroneous.
5. The Learned CIT-A has erred in confirming the levy of interest u/s 234B at INR. 14,80,487/-. The appellant denies the liability of payment of interest U/s 234B. On the facts & circumstances of the case the appellant submit that levy of interest u/ 234B at INR. 14,80,487/- is not justified and be deleted.

6. Before us Ld. AR brought to our notice findings of assessing officer and the respective MOU entered by the assessee. Further he brought to our notice page 47 of the paper book which is details of advance received from SIPL in financial year 2012–13, 2013–14 and 2014–15 to the extent of Rs.24,948,000/– and it was submitted that all these amounts were disclosed in the balance sheet as an liabilities and it is also submitted that the project on which assessee has made the investment is still under construction and the flats were not sold nor assessee had transferred the right over the property. The Ld AR submitted that the assessing officer wrongly made the addition during this year the whole profit which assessee would have made the profit on completion of the project. Therefore, he prayed that this issue may be remitted back to AO for proper verification and appreciate the facts on record.

7. On the other hand, Ld. DR objected to the above proposition and supported the findings of the lower authorities.

8. Considered the rival submissions and material on record. We notice that assessee had entered into a MOU with SIPL to invest in the project to be executed by SIPL. It was agreed between them that SIPL will complete the project and help the assessee to market and sell the flats. Accordingly, SIPL issued 18 post dated cheques to the assessee and in MOU it was agreed that the above said postdated cheques will be deposited by the assessee without reference to SIPL. We notice from the submission of the assessee that assessee had received the promised amount from SIPL in this assessment year but considered the same as advance since the project was not completed nor sold any flats this year. Further, it was submitted before us that even in other assessment years also assessee has received certain payments as per the MOU but not received the whole payment on the promised date. Even the project was not completed. We noticed that AO has proceeded to make addition of whole expected profit in this AY based on the promised payment schedule since assessee is a company and expected to follow the mercantile system of accounting. The same view was expressed by the Ld. CIT(A) in his order. In our considered view, from the records submitted before us, it clearly indicate that the project was not completed in this assessment year and promised payments against this project is part of the total agreed sales proceeds when the project is completed. We do not agree with the AO in bringing the whole profit of the project in the first year of execution of the MOU. Since, the claim of the assessee was not verified by the Ld. CIT(A) and it needs proper verification. We deem it fit to remit this issue back to the file of AO to redo the assessment *de novo* and direct him to verify the status of the project and can be taxed only to the extent of income which accrues to the assessee during this assessment year and direct

AO to give proper opportunity of being heard to the assessee. Accordingly, the grounds raised by the assessee are allowed for statistical purpose.

9. In the net result, appeal filed by the assessee is allowed for statistical purpose.

Order pronounced in the open Court on 02/06/2021.

Sd/-	Sd/-
(MAHAVIR SINGH)	(S. RIFAUR RAHMAN)
VICE PRESIDENT	ACCOUNTANT MEMBER

Mumbai;
Dated: 02/06/2021
Rahul Sharma, Sr. P.S.

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

BY ORDER,

//True Copy//

(Dy./Assistant Registrar)
ITAT, Mumbai